IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

MARTIN JESUS TOVAR,
Petitioner.

No. 2 CA-CR 2014-0266-PR
Filed November 24, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County
No. CR033211
The Honorable Christopher P. Staring, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barbara LaWall, Pima County Attorney
By Jacob R. Lines, Deputy County Attorney, Tucson
Counsel for Respondent

Martin Tovar, Adelanto, California
In Propria Persona

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Miller and Judge Espinosa concurred.

E C K E R S T R O M, Chief Judge:

¶1 Martin Tovar petitions for review of the trial court's denial of his pro se "Motion to Vacate, Writ of Error Coram Nobis, Under the All Writs Act. § 1651, and, or Any Other Recharacterizable Local Remedy Available," which the court construed as a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P.[1] For the reasons that follow, we grant review but deny relief.

¶2 In 1991, Tovar pleaded guilty to theft by control, an undesignated offense, and was placed on probation. In the spring of 1992, his probation was revoked after he admitted violating its conditions, his offense was designated a felony, and he was sentenced to 1.5 years in prison.

¶3 In 2014, he filed a motion seeking to vacate his conviction on the ground his attorney had rendered ineffective assistance during plea negotiations. In an affidavit submitted with his motion, he stated that neither the court nor his attorney had informed him of the immigration consequences of his plea and that his attorney had told him a conviction pursuant to his plea agreement would not be for an "aggravated offense" under relevant federal law and therefore would not trigger immigration consequences. He further averred that, contrary to the pre-plea

---

[1]The trial court correctly found Tovar's Rule 32 proceeding was not time barred, as he was sentenced before the deadlines imposed by Rule 32.4 took effect. *See* 171 Ariz. XLIV (1992); *Moreno v. Gonzalez*, 192 Ariz. 131, ¶ 22, 962 P.2d 205, 209 (1998).

information counsel provided, he is now subject to deportation based on his plea agreement and conviction and that, "with the correct advice, [he] could have negotiated to structure a sentence to avoid consequences, or would have negotiated the [expu]ngement of record of said case." In the context of this claim, he argued his plea had not been voluntary because he lacked an intelligent understanding of its consequences.

¶4 In a well-reasoned ruling, the trial court found Tovar's attorney had not misinformed him about his guilty plea or rendered ineffective assistance as Tovar alleged. The court explained that no immigration consequences had been associated with Tovar's conviction when he pleaded guilty in 1991, because it was not until 1996 that Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and amended the definition of "aggravated felony" to encompass a theft offense punishable by "at least one year" in prison, expressly providing that the amendment would apply retroactively, regardless of the date of conviction. *See* Pub. L. No. 104-208, div. C, § 321, 110 Stat. 3009 (amending 8 U.S.C. § 1101(a)(43)(G)). This petition for review followed.

¶5 On review, Tovar does not dispute the trial court's analysis of federal immigration law or its resolution of his ineffective assistance claim; instead, he argues his plea was not voluntarily and intelligently entered because of unknown immigration consequences imposed by Congress years after he pleaded guilty. He also argues that applying the 1996 amendment to his 1991 conviction violates the Constitution's prohibition against ex post facto laws. We review a trial court's summary denial of post-conviction relief for an abuse of discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find none here.

¶6 Tovar's argument that the relevant provision of IIRIRA was impermissible ex post facto legislation was never presented to the trial court, and his conclusory assertions below that his plea had not been voluntary appeared to have been made only in support of his claim of ineffective assistance. *See*, *e.g.*, *State v. Ysea*, 191 Ariz. 372, ¶ 17, 956 P.2d 499, 504 (1998) ("A defendant who has

detrimentally relied on erroneous legal advice has been prejudiced because the plea could not have been knowing and voluntary and thus has not made an informed choice."). We do not address issues raised for the first time on review. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980); *see also* Ariz. R. Crim. P. 2.9(c)(1)(ii) (petition for review should contain "issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review").

¶7 The trial court correctly resolved the issues presented in Tovar's motion. Accordingly, we grant review but deny relief.